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No. 875

# In the Supreme Court of the United States

OCTOBER TERM, 1958

HENRY TRAVIS SCHNAUTZ, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
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### OPINION BELOW

The opinion (Pet. 26) of the Court of Appeals is reported at 263 F. 2d 525.

### JURISDICTION

The judgment (Pet. 26) of the Court of Appeals was entered on February 18, 1959. The petition for a rehearing was denied on April 3, 1959 (Pet. 27). The petition for a writ of certiorari was filed on April 28, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support the judgment of conviction.

2. Whether the indictment was sufficient.

3. Whether the court's charge to the jury was correct.

STATEMENT

Following a jury trial, the petitioner was convicted under the fourth count of an indictment which charged him with conspiring with Ysidro C. Guerra, who was not a defendant, to violate the federal narcotic laws (R. 2–4, 214). He was sentenced to a term of imprisonment for two years (R. 218). On appeal, the judgment of conviction was affirmed (Pet. 26).

The evidence showed that a narcotics agent, posing as a heroin dealer who wanted to buy marihuana, was introduced to the petitioner by Rudy Rodriguez, whom petitioner knew (R. 25–29). The petitioner stated that he could arrange a sale of marihuana of the best quality, in any quantity (R. 31). The agent agreed to buy five pounds (R. 31). That evening, the petitioner reported that he had given the order to Guerra's man, Shorty. After a telephone call, the petitioner quoted a price of $70 a pound (R. 33–34). When the agent demurred at paying the money to the petitioner and asked to go along when delivery was made, the petitioner said his man would not deal with him if he showed up with a stranger (R. 34–36). The petitioner said that Mr. Rodriguez could go along since he knew the "connection" (R. 37). Later that evening, Mr. Rodriguez and the agent picked up a package of marihuana in the bushes off a highway (R. 24, 38–43). Some days later, the agent complained to the petitioner about the way in which delivery had been handled. The petitioner said that

when his man saw Mr. Rodriguez he became nervous, but finally took the money and said Shorty would show them where the marihuana was; that Shorty did point it out; and that neither he, petitioner, nor Mr. Rodriguez had tampered with it (R. 44–46). At this meeting the agent said that he was going to Chicago and would then need about a hundred pounds of marihuana. The petitioner agreed to send the marihuana by bus (R. 46–47).

The petitioner was arrested without any further purchases being made. He admitted selling marihuana to the agent, but said that the marihuana belonged to Guerra, and that he made only about $25.00 on the deal (R. 47–49, 94).

The court gave the jury detailed instructions with respect to the necessary elements in establishing the crime of conspiracy, including the necessity of proving *overt acts. In explaining the nature of the proof* necessary to establish the agreement or combination, the court stated:

> A conspiracy may be inferred from circumstances; it may be proven by overt acts. It is seldom that any one act by itself can prove a conspiracy, but a number of acts considered together may.

The petitioner's counsel objected to the instruction that a conspiracy could be inferred from circumstances and might be proved by overt acts (R. 165).

## ARGUMENT

1. The petitioner's attack on the evidence is without merit. This Court, in examining the record, must

take the view of the evidence most favorable to the government and must give to the government the benefit of all the inferences which reasonably may be drawn from the evidence. *Glasser* v. *United States*, 315 U.S. 60. The fact that both courts below held that the verdict was supported by substantial evidence is, of course, entitled to great weight here. *Kann* v. *United States*, 323 U.S. 88, 93; *United States* v. *Johnson*, 319 U.S. 503, 518; *Delancy* v. *United States*, 263 U.S. 586, 589–590.

As shown by the record, there was circumstantial evidence of an agreement between the petitioner and Guerra. This evidence consisted of more than the phone call to Guerra. The statements (R. 34–36) made by the petitioner to the agent indicate that there was an active and going conspiracy between the petitioner and Guerra. These statements, furthermore, show that, unlike the situation in *Lambert* v. *United States*, 101 F. 2d 960 (C.A. 5), the petitioner was acting pursuant to agreement with the seller and on behalf of the seller.[1]

2. The sufficiency of the indictment, which the petitioner unsuccessfully challenged before trial (R. 5–17), also presents no issue of merit. The indictment charged a conspiracy between named persons (the petitioner and Guerra) between fixed dates (February 1 to February 20) to commit offenses

[1] The fact that the petitioner was acquitted on the substantive counts does not prevent him from being found guilty under the conspiracy count. The offenses under the substantive aider and abettor count and the conspiracy count were separate and distinct. Cf. *Pinkerton* v. *United States*, 328 U.S. 640, 643–644; *United States* v. *Crowe*, 188 F. 2d 209 (C.A. 7).

against the United States. It then alleged that the offenses were "knowingly and willfully" to acquire and transfer marihuana without paying the tax and not pursuant to an order form, and "knowingly, with intent to defraud" to conceal and transport marihuana. It specified overt acts on February 2 in furtherance of the conspiracy (R. 3–4). The indictment clearly did allege intent. It also did define the agreement with sufficient particularity as to time and parties to protect the petitioner from a second prosecution.

3. The judge's charge to the jury was correct. Of course, the essence of the conspiracy was the agreement, but that agreement may be inferred from circumstantial evidence. *Blumenthal* v. *United States*, 332 U.S. 539, 549. What any party actually did—the overt acts—may properly be considered as part of the circumstances from which the jury can infer agreement. *American Tobacco Co.* v. *United States*, 328 U.S. 781, 789; *United States* v. *Holt*, 108 F. 2d 365, 368–369 (C.A. 7), certiorari denied, 309 U.S. 672.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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